PETROJASA SDN BHD

v.

MINISTER OF FINANCE, GOVERNMENT OF SABAH

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT J
[APPLICATION FOR JUDICIAL REVIEW NO: 25-12-2005]
27 APRIL 2006

CIVIL PROCEDURE: *Government proceedings - Claim for money due from state government - Application for - Government Proceedings Act 1956, s. 33 - Whether word 'shall' in s. 33(3) Government Proceedings Act 1956 imposes mandatory obligation on government to pay upon presentation of certificate - Whether application prohibited by s. 33(4) Government Proceedings Act 1956 - Whether judgment obtained by applicant could be enforced by way of mandamus*

WORDS & PHRASES: *'shall' - Government Proceedings Act 1956, s. 33(3) - Whether imposes mandatory obligation on government to pay upon presentation of certificate*

The applicant had earlier filed a suit against the government of Sabah in 1999 and the judgment was given in favour of the applicant on 1 April 2002. The judgment remained barren for four years thereafter despite the fact that the applicant had on 20 May 2004 obtained a certificate pursuant to s. 33 of the Government Proceedings Act 1956 ('GPA'). The applicant's requests for payment from the government was, however, met with recalcitrance. The applicant thus made an application pursuant to s. 25 of the Courts of Judicature Act 1964 (CJA) and s. 44 of the Specific Relief Act 1950 and asked the court to command the Minister of Finance of the government of the state of Sabah to pay the applicant what was lawfully due under the certificate. It was the applicant's submission that the use of the word 'shall' in s. 33(3) GPA imposes a mandatory obligation on the government to pay upon presentation of the certificate.

Held (dismissing the application):

(1) The correct view was that s. 33(3) of the GPA was subject to subsection 4, not only because the latter followed immediately after and qualified the former, but more importantly, because to hold otherwise would render the parenthesis in subsection (3) redundant or otiose and that

could not have been the intention of the legislature. It followed, therefore, that the application was prohibited by s. 33(4) GPA which clearly envisaged prohibition of the order asked for by the applicant. The judgment obtained by the applicant could not be enforced by way of *mandamus* against the Minister of Finance of the government of the state of Sabah.

Case(s) referred to:
Franklin v. The Queen [1973] 3 All ER 861 ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 CA ***(refd)***
Inland Revenue Commissioners v. Hinchy (HL) [1960] 1 All ER 505 ***(refd)***
Loh Wai Kong v. Government Of Malaysia [1978] 2 MLJ 175 ***(refd)***

Legislation referred to:
Constitution of the State of Sabah, art. 29(2)
Courts of Judicature Act 1964, s. 25
Government Proceedings Act 1956, ss. 33(3), (4)
Rules of the High Court 1980, O. 45, 46, 47, 48, 49, 50, 51, 52, O. 73 r. 12
Specific Relief Act 1950, s. 44(1)
Colonial Stock Act 1877 [Eng], s. 20
Crown Proceeding Act 1947 [Eng], s. 25
Rules of the Supreme Court 1965 [Eng], O. 45, 46, 47, 48, 49, 50, 51, O. 48 r. 1, O. 77 r. 15

For the applicant - Chen Kok On; M/s Peter Lo & Co
For the respondent - Hanafiah Kassim

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] The applicant filed a suit against the Government of the State of Sabah in 1999. Judgment was given in favour of the applicant on 1 April 2002 and the judgment remained barren four years thereafter despite the fact that the applicant had on 20 May 2004 obtained a certificate pursuant to s. 33 of the Government Proceedings Act 1956 stating that the sum of RM6,153,497.44 together with interest thereon at 4% per annum from 12 January 1999 to 1 April 2002 and thereafter at 8% per annum until full settlement and taxed costs of RM405,311.55 with interest thereon

at 8% per annum. Such was the considerable amount of money lawfully due from the State Government to the applicant whose persistent requests for payment was met with recalcitrance. It was not surprising, therefore, that the applicant was utterly disappointed and this application was the result of that. The applicant is now asking the court to command the Minister of Finance of the Government of the State of Sabah to pay the applicant what is lawfully due under the certificate. The application is made pursuant to s. 25 of the Courts of Judicature Act 1964 (CJA) and s. 44 of the Specific Relief Act 1950 (SRA).

Section 44 SRA states:

> (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
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> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
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> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
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> (d) the applicant has no other specific and adequate legal remedy;
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> (e) the remedy given by the order applied for will be complete.
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> (2) Nothing in this section shall be deemed to authorize a Judge:
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> (a) ...
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> (b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government, or
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> (c) to make any order which is otherwise expressly excluded by any law for the time being in force.

The relevant provisions of the CJA are these:

Section 25 CJA:

> (1) ...
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> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Paragraph 1 of the Schedule states:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

The applicant's argument is formulated on s. 33(3) of the Government Proceedings Act 1956 (GPA) which states:

> If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon.

Learned counsel for the applicant, Mr. Chen Kok On submits that the use of the word "shall" in s. 33(3) GPA imposes a mandatory obligation on the Government to pay upon presentation of the certificate. Learned counsel relies on a passage in the *Halsbury's Laws of England* (4th edn) concerning s. 25 of the Crown Proceedings Act 1947 which is the genesis of and in *pari materia* with s. 33 of the GPA:

> None of the ordinary methods of execution apply to orders against the Crown, and a special procedure is prescribed for their enforcement in the High Court. Where ... an order is made in favour of any person against the Crown or against a government department or an officer of the Crown as such, the proper officer of the court will ... issue a certificate in the prescribed form containing the judgment ... and the appropriate government department must, unless payment is ordered to be suspended pending an appeal or otherwise, pay to the person entitled or his solicitor ... Apart from what has been stated in this and the

> preceding paragraph, no execution or attachment or process in the nature thereof can be issued against the Crown, and no person is individually liable under any order for payment by the Crown, or any government department or any officer of the Crown as such, of any such money or costs.

(See vol. 17 para. 415)

That, in my view, is the correct statement of the law and brings me to the objection grounded on s. 33(4) of the GPA put forth by learned state legal officer, Encik Hanafiah Kassim. Section 33(4) states:

> Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

Learned counsel for the applicant contends that the phrase "subject as hereinafter provided" which immediately follows the word "shall" in s. 33(3) refers exclusively to the proviso which states:

> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

[2] Since there is no appeal against the judgment in respect of which a certificate has been issued, it is argued that an order of *mandamus* would ensue to compel compliance with the statutory obligation imposed on the Government of the State of Sabah by sub-section (3) of s. 3 GPA. While I have no problem accepting the view that s. 33(3) operates to impose a statutory obligation on the State Government, it would be perverse in my view, to go on to suggest that the court is entitled to direct or order compliance because there is no basis for imputing that into the subsection. I think, the view expressed by Shaw, J in *Franklin v. The Queen* [1973] 3 All ER 861 at p 867 would shed some light on the fallacy of the argument advanced on behalf of the applicant:

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> I have ventured to express the view that it was unnecessary to go beyond stating that the sum in question was due and that the suppliant was entitled to be paid. The reference to the registrar was, so it seems to me, otiose. The mode of bringing about a satisfaction of the judgment is a matter of statutory prescription and not of judicial direction or order.

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Shaw, J was referring to the situation faced by a suppliant who was seeking satisfaction of the balance of the money due to him from the Bank of England under a judgment obtained against the Crown under s. 20 of the Colonial Stock Act 1877 the operative

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parts of which were these:

> Any person claiming to be interested in colonial stock ... may present a petition of right in England in relation to such stock ... and such judgment, decree, rule, or order shall be complied with by the registrar ...

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[3] Encik Hanafiah Kassim argues that s. 33(3) GPA is subject to subsection (4). I think that is the correct view, not only because the latter follows immediately after and qualifies the former but more importantly, because to hold otherwise would render the

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parenthesis in subsection (3) redundant or otiose and that could not have been the intention of the legislature. It follows, therefore, that the application is prohibited by s. 33(4) by virtue of these operative words "... no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing

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payment by the Government ..." which clearly envisage prohibition of the order asked for by the applicant because "process" in subsection (4) of s. 33 GPA has been defined thus:

> "Process" may signify the means whereby a Court compels a

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> compliance with its demands. (See *Words and Phrases* – legally defined 3d Ed Volume 3 John B Saunders)
>
> "Process" A form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction. The process of the Supreme Court of Judicature consist of writs

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> (q.v.), originating summonses (q.v.), motion (q.v.) and petition (q.v.) ...
>
> (see Osborn's Concise Law Dictionary, Eighteenth Edition at p 264 and RHC 1980 Orders 5 to 10)

I

That would have been enough to dispose of the application but for the sake of completeness I shall revert to the statutory provisions set out above upon which this application rests. Section 44(1) of the SRA is of no assistance to the applicant because the respondent is not a "person holding a public office". *Loh Wai Kong v. Government Of Malaysia* [1978] 2 MLJ 175 is an authority relied on by the learned senior state counsel, and in my view rightly so. The headnote reads:

> In this case the applicant applied for an order directing the respondents to issue a Malaysian passport to him alternatively to show cause why the said order should not be made. It was claimed on behalf of the respondents that the issue of a passport was a prerogative of the Yang di-Pertuan Agong.
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> Held:
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> (1) an order under section 44 of the Specific Relief Act, 1950 can only be made against a person holding a public office and could therefore not be made against the first two respondents, the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri;

Gun Chit Tuan, J had this to say at p 178:

> According to section 3 of the Interpretation Act, 1967, "public office" means an office in any of the public services, and "public services" means the public services mentioned in Article 132(1) of the Federal Constitution. Therefore, the first and second respondents in this case, namely the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri, Malaysia who are not persons holding a public office within the meaning of section 44 of the Specific Relief Act have, in my view, been wrongly cited as respondents.

"Public office" is not defined in the Interpretation and General Clauses Enactment 1963. Reliance on *Loh Wai Kong* is, therefore, not misplaced.

[4] It is noteworthy that learned counsel for the applicant has almost totally strayed from the original basis of this application. To be fair, there is some reference to para. 1 of the Schedule of the CJA where learned counsel has brought to my attention a passage in the judgment of Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665:

> Consequently, the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
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> In my judgment, the wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.

Apart from the doctrine of *stare decisis*, I would be the first to subscribe to and uphold the wisdom embodied in the above-quoted passage but I do not think that in the pursuit of justice, judicial activism should be taken to its logical extreme by the total disregard for the language of the relevant statutes. The *dicta* explicitly qualifies the extent of judicial activism in the interpretation of statutes. Here, s. 33 GPA and s. 44 SRA clearly restrict the wide powers conferred by para 1 of the Schedule to the CJA which must be read together with s. 25 thereof. Perhaps it would be apt to put what I have stated into perspective by reproducing a passage in the judgment of Lord Reid in *Inland Revenue Commissioners v. Hinchy* (HL) [1960] 1 All ER 505 at p 512:

> Difficulties and extravagant results of this kind caused Diplock, J, and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the Crown's contention. But we can only take the intention of Parliament from the words which they have used in the Act and, therefore, the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences and however strongly we may suspect that this was not the real intention of Parliament.

[5] I do not think that it is either necessary or useful to embark on an in-depth analysis of the constitutional aspects of the application because the arguments advanced on behalf of the applicant on the relevant constitutional rights enshrined in the constitution are at best tenuous. Likewise, the reliance by the applicant on the observation made by Lord Denning MR in *Franklin* at p. 871 is also unsustainable:

> ... It seems to me that those proceedings afford a convenient, appropriate and just means of ascertaining what moneys the Bank of England, and, I may add, the Reserve Bank of Rhodesia, have in this country which are moneys of the government of Southern Rhodesia.
>
> ... If it is found in those proceedings that there are any moneys available in addition to the 41 pounds, one can be quite sure that the Bank of England will pay them over in accordance with the statute. If they did not do so, a *mandamus* would lie to compel them.

[6] It has to be emphasised that the above passage was made *obiter* in reference to another proceedings commenced by the Bank of England for declarations relating to funds and assets it held and the judgment creditor counterclaimed to the effect that there were monies available to satisfy that part of the judgment which remained unpaid. What happened in that case was that the judgment creditor had invoked O. 48 r. 1 of the RSC 1965 to examine the chief accountant of the Bank of England because he had only been paid 41 pounds out of the total judgment sum of 218.87 pounds. Shaw J, reversed the order made by the master pursuant to O. 48 r. 1 RSC 1965 and this decision was affirmed by the Court of Appeal. This was what Lord Denning MR held in conclusion at p. 871:

> In addition, RSC Ord 77, r. 15, says that nothing in RSC Orders 45 to 52 – which includes RSC Ord 48 – shall apply in respect of any order against the Crown.

Order 77 r. 15 RSC is identical to O. 73 r. 12 of our RHC 1980 and sub-rule (1) states:

> Nothing in Orders 45 to 52 shall apply in respect of any order against the Government.

Orders 45 to 52 of the RHC 1980 are similar to O. 45 to O. 52 of the RSC and they refer to provisions for enforcement and execution of judgments and orders.

[7] Perhaps it is not inappropriate, in the circumstances faced by the applicant, to lament as Shaw J, did in *Franklin* in these terms at p. 869:

> It is, of course, regrettable that the suppliant, as many others in a like situation, should be put to such shifts to recover what is undeniably due to him. History, so I was told by counsel for the suppliant, provides no precedent for a failure by the Crown to do right by the subject after a finding in his favour on a petition of right.

Be that as it may, there was a ray of hope for the judgment creditor in *Franklin* because earlier in his judgment at p 868 Shaw J, was somewhat reassuring:

> If the registrar fails to or neglects to comply with his statutory duty to do the requisite acts within his powers, there are no doubt ways and means for dealing with such recalcitrance. I am not concerned to consider what would be the appropriate course, judicial or executive, that might be taken.

and likewise that which was stated in conclusion at p 869:

> It does not follow that the law is destitute of some appropriate and effective means available to the suppliant to pursue his judgment to satisfaction.

In any event, there was never any doubt as to the willingness of the Bank of England to comply with its statutory obligation, the only impediment was the perception that only 41 pounds was available towards settlement of the judgment sum. Not so, in the instant application if the cheeky response of the Government of the State of Sabah to this application four years after judgment was obtained is anything to go by. This is what the Under Secretary of Monitoring Public Agencies and State Investment Section to the Ministry of Finance, an agent of the State Government of Sabah states in his affidavit in opposition filed in these proceedings:

> In any event, despite the existence of the said judgment the respondents undertakes to make payment to the principle sum and thereat the interest payable as soon as funds is made available without prejudice as to any possibility for an amicable settlement that may be available and which is acceptable to the applicant.

[8] It does not require any scholarly examination of this so-called undertaking to come to the immediate conclusion that this is but a disingenuous ruse to defer payment indefinitely. And what, the applicant would certainly wonder, does "amicable settlement" have to do with the payment of the monies stated in the certificate regularly obtained according to the laws of the land. Availability and sufficiency of funds are certainly not one of the infinite possibilities embodied in that hollow and unconsoling undertaking. The mechanism for the State Government of Sabah to comply with the statutory obligation imposed by s. 33(3) is even enshrined in the Constitution of the State of Sabah. Article 29(2) provides:

> There shall be charged on and paid out of the Consolidated Fund in addition to any grant, remuneration or other moneys so charged by any other provision of this Constitution or by State law:
>
> (a) all debt charges for which the State is liable; and
>
> (b) any moneys required to satisfy any judgment, decision or award against the State by any court or tribunal.

[9] The applicant is not alone because there are others who have variously obtained judgments, decisions or awards against the Government of the State of Sabah which remain barren to this day. I do not propose to speculate on how much longer the Government of the State of Sabah can continue to defy the law and play the ostrich before it undermines the basis of its very existence. I would certainly eschew a discussion on the wisdom, or lack of it, of the abject recalcitrance of the Government of the State of Sabah in these circumstances. I need not say more, except lament the hollowness of the salutary expression of Lord Denning in *Franklin* at p 871 – "It is always presumed that, once a declaration or entitlement is made, the Crown will honour it. And it has always done so." – and my misfortune in being placed in a situation where the court is helpless to put right what is clearly an unmitigated wrong. The judgment obtained by the applicant cannot, for the reasons aforesaid, be enforced by way of *mandamus* against the Minister of Finance of the Government of the State of Sabah. The application is accordingly dismissed with costs.

Order accordingly.